87-1470

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN the SUPREME COURT of the UNITED STATES

James V. and Esther R. Cole
-petitioners-

V.

United States
-defendant-

PETITION FOR WRIT OF CERTIORARY

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

James V. Cole
per se
7300 Madrona Dr. N.E.
Bainbridge island
Washington 98110

(a) QUESTIONS PRESENTED

1. Does the Commissioner have legal authority at all to issue,and prosecute to its conclusion, a Section 6212(a) notice of deficiency when at the time of such issuance and prosecution he has knowledge or has in his possession material from which he would be able, but for his neglegence, to gain knowledge that the amount demanded was greater than authorized by law?

2. Were petitioners Constitutional rights abridged when the Tax Court neither "redetermined" the deficiency or cited any law or rule of law which prevented it from doing so in James V. and Esther R. Cole V. Commissioner of Internal Revenue, U.S.T.C. Reports Volume 64 at 1091,and when the district courts refused refund under 26 U. S.C. Sec.6511(d) (2) (B), Sec.1311-1314 and sec.481(b) (3) (b).

3. Was petitioners constitutional right to due process of law,and equal protection of the laws violated when the Court of Appeals for the Ninth Circuit,in Cole V.C.I.R.586 F.2d 747, cert. den.(hereafter referered to as case No.2), "affirmed" the Tax Courts "report" and "decision" re Tax Court case No.1 "solely upon the discretionary power of the Commissioner under Section 446(b)?

4. Were petitioners subjected to unreasonable search and seizure when the Commissioner, and the courts used the information gleaned in there search of petitioners papers to petitioners detriment, but refused to use the information so gleaned which would have been beneficial to petitioners if used?

(b) PARTIES TO THE PROCEEDINGS

James V.Cole	as primary party
Esther R. Cole	as Passive party
United States	as defendant

TABLE OF CONTENTS

PAGE

(a) QUESTIONS PRESENTED.....1

(b) PARTIES TO THE PROCEDINGS.....2

TABLE OF CONTENTS.....B

TABLE OF AUTHORITIES.....B1

(d) OFFICIAL AND UNOFFICIAL REPORTS...3

(e) STATEMENT OF JURISDICT-.... (i) 7
IONAL GROUNDS..... (ii) 7
(iv) 7

(f) CONSTITUTIONAL PROVISIONS.....8

(f) 26 U.S.C.STATUTES SUBTITLE A.....9

(f) 26 U.S.C.STATUTES SUBTITLE B.....12

(g) (i) STATEMENT OF THE CASE.....14

(g) (ii) MATERIAL FACTS.....19

(g) (iii) REASONS FOR WRIT.....28

(g) FRAUD UPON THE COURT.....31

(g) DUE PROCESS AND EQUAL
PROTECTION OF THE LAWS.....40

(g) PETITIONERS' ACTIONS FOR
REFUND IN DISTRICT COURT.....48

TABLE OF AUTHORITIES

CASES PAGE

Adolph Coors V.C.I.R.
519 F2d 1280 (1975).....43

Benenson V. United States
257 Sup. 101 (1966).....43

Cole James V. and Esther R. V.
Commissioner of I.R.S.,
64 U.S.T.C. 1091 1,3

Cole V.C.I.R. 586 F2d 747.....2,4,

Cole V. Com. 81-2 U.S.T.C.
87-789.....4

Court Holding Co.
2 T.C. 531.....21,40

Dobson V. Comm.
320 US 489-508.....44,45

Graph Chevrolet Co V.Campbell
343 F2d 568.....43

Hazel Atlas Glass Co.V.
Hartford-Empire Co.
322 US 238.....31,34,37

John D. Fackler
39 B.T.A. 1939.....21,40

Kenner V. Comm.(1968,CA7)
387 F2d 689.....31,32

Lockwood V.Bowles.....33

Magruder V. Safe Deposit &
Trust Co. 159 F2d 913.....49

Martin V. Brodrick
177 F2d 886.....49

Oklahoma Gas and Electric Co.
V.Comm. 464 F2d 1188 (1972)....44

Peoples Bank and Trust Co.
V. C.I.R.415F2d 1349 (1969)...43

Russell V. C.I.R. 678 F2d
782 (1982).....15,16,18,49

Security Flour Mills V.Comm.
321 US 281 (1944).....20,42

Toscano V. Comm.(1971
CA9) 441 F2d 930.....32

Van Dyke V. Kuhl
171 F2d 187.....49

Western Cas.and Sur.Co.V.C.I.R.
571 F2d 514 (1978).....43

(d) OFFICIAL and UNOFFICIAL REPORTS

The progenitors of this appeal, Tax Court case No.28980-85 and appeal of that case Appeals Court case No.86-7531, were the culmination of a series of suits which resulted from the Commissioner's issuance, on April 7,1972, of a statutory notice of deficiency which demanded a greater sum than authorized by law.

The court actions which were the result of the afore-mentioned deficiency notice are, from start to present,with exception of the progenitors of this appeal set forth above, are:

1. Tax Court case No.5403-72, James V. and Esther R, Cole v Commissioner of internal Revenue, U.S.T.C.Reports Volume 64 at 1091, petition filed June 1972,"Report" filed September 25,1975, rehearing denied, "Decision" filed November 4,1976.

2. Appeal of T.C.case No.5403-72 to the

Court of Appeals for the Ninth Circuit case No.77-1566, filed January 18,1977, Decision filed November 22,1978, Cole v.C. I.R. 586 F.2d 747, cert. den..

3. District Court case No.C78-381 ,filed June 29,1978 for refund from the taxable years 1969,1970,and 1971,motion to enlarge complaint to include refund from the taxable year 1968 filed June 8,1979, Decision Filed May 6,1981. Request for new trial, noted for June 5,1981, with brief in support of new trial, Cole v. Com. 81-2 U.S. T.C. at 87,789.

4. Appeal of case No. C78-381 was, by order dated January 20,1982 denied because of pending motion in District Court for new trial. By memorandum and Order dated February 3,1982 the District Court denied petitioners' above mentioned request for new trial. Petitioners again appealed from the above mentioned District Court Decis-

ion; by memorandum dated March 7,1983 the Court of Appeals affirmed the District Court's decision. Petition for rehearing was denied.

5. District Court case No.C78-960 filed July 11,1983, for refund under Sec. 1311. Order filed March 2,1984 granting defendant's motion to dismiss on the grounds of res judicata. Motion for reconsideration denied.

6. Appeal of case No. C83-960 V to the Court of Appeals for the Ninth Circuit,No. 84-3916 filed June 11,1984.Memorandum filed May 13,1985.

7. Motion,to the Court of Appeals for the Ninth Circuit,for leave to file a late motion to vacate decision by reason of fraud upon the court,dismissed without prejudice to petitioners' ability to seek relief from the Tax Court under rule 162. Dismissed November 6,1987.

The Memorandums and orders issued in respect of the progenitors of this petition, the case numbers of which were set forth in the first paragraph of this section, appear in appendix infra.

The period in which review of the cases listed above as numbers 1 to 7 has long since expired. Therefore the decisions re these cases are not included in appendix. However, neither the time of entry, or the law of the case prevents this court from examining an earlier decision where fraud upon the court and Constitutional rights are at issue.

The cases set forth above numbered 1 to 7 will be refered to in this petition by the above assigned numbers.

(e) STATEMENT OF THE GROUNDS On WHICH JURISDICTION INVOKED

(i) The Memorandum of the Court of Appeals was filed September 28,1987.

(ii) Petitioners' petition for rehearing was denied by order filed November 6,1987.

(iv) Statutory jurisdiction of this Court is found under Section 7482 (a) 1/ in the manner provided in Section 1254 of Title 28 of the United States Code.

1/ All Sections cited herein refer to the Internal Revenue Code of 1954 as ammended unless otherwise stated.

(f) CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4

"The right of the people to be secure in their ---papers---and effects, against unreasonable search and seizures, shall not be violated and no warrants shall issue,but upon probable cause,supported by oath or affirmation,and particularly describing the place to be searched,and the persons or things to be seized."

Amendment 5

"---nor be deprived of life,liberty, or property,without due process of law---."

Amendment 7

"In suits at common law,where the value in controversy shall exceed twenty dollars,the right of trial by jury shall be preserved,---."

Amendment 14

"---nor deny to any person within its jurisdiction the equal protection of the laws."

(f) 26 U.S.C. STATUTES

INTERNAL REVENUE CODE AS OF JULY 1977

SUBTITLE A-INCOME TAX

Sec.63(b) "For the purposes of this subtitle, in the case of an individual, the term "taxable income" means adjusted gross income-

(1) reduced by the sum of-
(A) the excess itemized deductions, and---."

Sec.163(a) "There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtededness."

Sec.172(a) "There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year,---"

Sec.446(a) "GENERAL RULE.- Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books."

Sec.446(b) "EXCEPTIONS.- If no method of accounting has been regulary used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income."

Sec.481(a) "GENERAL RULE.-In computing the taxpayer's taxable income for any taxable year (referred to in this section as the "year of the change")-

(1) if such computation is under a method of accounting different from the method under which the taxpayer's taxable income for the preceding taxable year was computed, then

(2) there shall be taken into account those adjustments which are determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted,---"

Sec.1311(a) "GENERAL RULE.- If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part ---,then the effect of the error shall be corrected by an adjustment made in the manner specified in section 1314."

Sec.1311(b)(2)(B) "DETERMINATION DESCRIBED IN SECTION 1312 (4).- In the case of a determination described in section 1312(4) (relating to disallowance of certain deductions and credits), adjustment shall be made under this part only if credit or refund of the overpayment attributable to the deduction or credit described in such section which should have been allowed to the taxpayer was not barred,by any law or rule of law, at the time

the taxpayer first maintained before the Secretary or before the Tax Court, in writing,that he was entitled to such deduction or credit for the taxable year to which the determination relates."

Sec.1312(4) "DOUBLE DISALLOWANCE OF A DEDUCTION OR CREDIT.- The determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year,or to a related taxpayer."

Sec.1313(a) "DETERMINATION.-For purposes of this part,the term "determination" means-

(1) a decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final."

Sec.1314(b) "(b) METHOD OF ADJUSTMENT.- The adjustment authorized in section 1311 (a) shall be made by assessing and collecting, or refunding,or crediting, the amount thereof in the same manner as if it were---an overpayment claimed by such taxpayer,---for the taxable year or years with respect to which an amount is ascertained under subsection (a), and as if on the date of the determination one year remained before the expiration of the periods of limitation upon---filing claim for refund for such taxable year or years. If, as a result of a determination described in section 1313(a) (4),an adjustment has been

made by the assessment and collection of a deficiency---, and subsequently such determination is altered or revoked, the amount of the adjustment ascertained under subsection (a) of this section shall be redetermined on the basis of such alteration or revocation and any overpayment---resulting from such redetermination shall be refunded,---as an adjustment under this part. In the case of an adjustment resulting from an increase or decrease in a net operating loss---which is carried back to the year of the adjustment, interest shall not be collected or paid for any period prior to the close of the taxable year in which the net operating loss---arises."

SUBTITLE F-PROCEDURE AND ADMINISTRATION

Sec.6211(a) "(a) In general.-For purposes of this title in the case of income---taxes imposed by subtitle A---the term "deficiency" means the amount by which the tax imposed by subtitle A ---exceeds the excess of-
(1) the sum of
(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon,---."

Sec.6213(a) "(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT- within 90 days---after the notice of deficiency authorized in section 6212 is mailed---the taxpayer may file a petition with the Tax Court for redetermination of the deficiency.---"

Sec.6214(b) "(b) JURISDICTION OVER OTHER YEARS AND QUARTERS.-The Tax Court in redetermining a deficiency of income tax for any taxable year ---shall consider such facts with relation to the taxes for other years---as may be necessary correctly to redetermine the amount of such deficiency,---."

Sec.6511(a) "(a) PERIOD OF LIMITATIONS ON FILING CLAIM.-Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later,---.".

Sec.6511(d) (2) (B) APPLICABLE RULES.- "(i) If the allowance of a credit or refund of an overpayment of tax attributable to a net operating or a capital loss carryback is otherwise prevented by the operation of any law or rule of law other than section 7122, relating to compromises, such credit or refund may be allowed or made, if claim therefor is filed within the period provided in subparagraph (A) of this paragraph.

(g) (i) STATEMENT OF THE CASE

This appeal is for review of:

A. The Tax Court's denial of petitioners' request for calendaring and redetermining their U.S.income tax liability for the taxable year 1968, and

B. The Court of Appeal's affirmation of the Tax Court's Refusal to calendar and redetermin said deficiency.

The cause of action which entitled petitioners to petition the Tax Court for redetermination of there 1968 taxable income, and hence there tax liability for that year was:

1. Identical to that which caused the Court of Appeals for the Ninth Circuit to remand Russell V. C.I.R. 678 F2d 782 (1982 to the Tax Court for proceedings consistent with its finding that;

(a) the Tax Court's failure to rule on the refund claim left the matter of the

refund claim pending in Tax Court;and

(b) the 1974 Tax Court decision was only in interim decision, and was not a final determination of Russell's cause of action for res judicata purposes, and

2.The commissioner violated the law Sec. 446(b) and Sec.7214(b) when he issued and prosecuted to its conclusion a Sec.6212(a) statutory notice of deficiency,when at the time of such issuance and prosecution he had knowledge or had in his possession material from which he would be able, but for his negligence, to gain knowledge that the amount demanded was greater than authorized by law. The prosecution through the courts of this unlawfull Section 6212(a) notice of deficiency amounted to "fraud upon the court".

3. The total disregard of Statutory law, Revenue Rulings, and case law, by the various courts involved in upholding an unlawful statutory notice of deficiency,denied

to petitioners there Constitutional right, to due process of law, equal protection of the laws, and the right to be secure in their papers from unreasonable search.

4. The progenitor of this case, case No. 28980-85 was filed under the rationale of Russell V. Commissioner,and briefed on that issue; i.e. the Tax Court erred when it failed to redetermine the alleged deficiency in the first Tax Court case. The case was amended to include "fraud upon the court" as a grounds of jurisdiction. Neither the Tax Court or the Ninth Circuit Court of Appeals addressed the issue posed by the similarity between this case and Russell, the Tax Court avoided the issue by conjuring the two pleadings into "intrinsic fraud" and the Court of Appeals just ignored the issue. The Court Of Appeals obfuscated the facts by these untruths:

1. "The district court originally upheld

the Commissioner's deficiency determination as of that year which disallowed taxpayers'deduction for 40 months' prepaid interest and required them to allocate that interest to the tax years to which each related."; 2."In 1973 taxpayers filed a refund action in the district court seeking a refund of taxes for the 1968 tax year based on the proposition that net operating losses suffered in 1970 and 1971 should be carried back to offset 1968 liability."; 3. Taxpayers now seek to set aside the earlier decision---"; 4 The only "fraud" asserted by tax payers was their allegation that the tax court erred in its resolution of their claim."

Petitioner refute the above quoted statements of fact made by the Court of Appeals as follows in order cited:

1. The Tax Court, not the district court "originally" upheld the Commissioners deficiency notice, and that court did not re-

"require them to allocate that interest". The statutory requirments for litigation via the two forums are entirly different.

2. Taxpayers overpaid their 1968 taxes under duress in september 1977, therefore could not "file a refund action" in 1973.

3. Taxpayers do not "now seek to set aside the earlier decision",they hold that it is no more necessary to "set aside" the the earlier decision in Cole than it was in Russell.

4. "Taxpayers" claim of fraud was not "that the tax court had erred"."Taxpayers" allegation of fraud was and is, that Both the Commissioner and the Tax Court knew at the time of their actions that they were demanding a greater sum than authorized by law, and such demand is an offense under section 7214(a), and therefore fraudulent.

(ii) MATERIAL FACTS

The following facts are taken from or are supported by,the excerpts of record submitted to the Court of Appeals, which excerpts are from documents submitted to the lower court in this action. The above referred to excerpts are designated therein by employing A to I as pertains to lower court documents,and 1 to 32 as pertains to documents submitted to the lower court as evidence. These excerpts will be referred to in this pleading as- E.R. followed by the letter or number as the case may be.

1. During the years 1938-1972 petitioners kept their books and computed and paid their income tax on the cash basis.

2. Respondent issued a Sec.6212(a) notice of deficiency based upon the assumption that Sec.446 allowed and required a hybrid method of computing taxable income.E.R.2

3. The statutory notice of deficiency demanded payment of a greater sum than authorized by law,under the hybrid method, this fact was known to respondent. E.R.2, E.R.10, E.R.11, E. R.12, E.R.16, E.R.27, E.R.28.

4. Petitioners timely filed for redetermination of the deficiency under sec. 6213(a). E.R.3.

5. Petitioners challenged the alleged deficiency on the grounds that; 1.they were exempt from the Commissioners Ruling in Rev. Rul.68-643 by the non-retroactive clause contained therein; 2.The issue of requiring or allowing a method of accounting which was neither the cash method nor the accrual method,but was a combination of such methods was put to rest by the Supreme Court in Security Flour Mills v. Commissioner 321 U.S. 281 (1944); 3. the issue of the deductibility of prepaid interest by a cash basis taxpayer was settl-

ed by; John D. Fackler, 39 B.T.A.1939, and Court Holding Co4,2 T.C. 531, and I.T.3740 C.B. 104 (1945).

6. At trial, before the Tax Court, defendant stipulated:

> 1. "Rather than stipulate to figures the parties have determined that they will stipulate to tax returns of Mr. Clifford Cole and his wife and Mr. James Cole and his wife for a number of years,(the two cases were consolidated for trial) probably '63 through 71." E.R.4: 2."If respondent prevails in this case then by the terms of the statutory notice the interest paid by the Coles will be prorated over the period of the loan." E.R.5 and 6:

7. Petitioners supplied their cash basis tax returns to respondent and the Tax Court after trial as demanded. E.R.6-7.

8. On September 25,1975 the Tax Court filed their opinion,finding:

> "Held no binding contract existed on November 26,1968. the non-retroactivity provision of Rev.Rul.68-643,1968 2 C.B. 76, were unsatisfied.Held further, petitioners' method of accounting for prepaid interest does not clearly reflect income,and the disallowance of the prepaid interest deduction is therefore sustained".

The Tax Court further stated: "Decision will be entered under Rule 155.". E.R.30.

9. During the Rule 155 period,i.e.between the date on which "respondent prevails" (ed) by opinion of the Tax Court re the method change issue, and the date of the court's decision, respondent refused to join with petitioner for the purpose of submitting an agreed upon computation for entry of decision under T.C.Rule 155(b). During this period respondent maintained they would refund the excessive amount collected through the mitigation provisions Secs. 1311-1314.

10. After the decision of the Tax Court respondent made considerable effort to persuade, both C.Cole and J. Cole to abandon their attempt to obtain a lawful computation of their 1968 taxable income under the hybrid method proposed by them. Due to economic conditions Clifford Cole

acquiesced to their demands in the fall of 1979.

11. On November 4,1976 the Tax Court entered its decision, stating:

> "Pursuant to the opinion of the Court filed September 25,1975,and incorporating herein the facts recited in respondent's computation as the findings of the court, it is
> ORDERED and DECIDED: That there is a deficiency in income tax due from petitioners for the taxable year 1968 in the amount of $29,437.96.". E.R.21.

12. The years involved in accounting for the interest under the accrual method were all open for refund on the date petitioners filed for redetermination of the alleged deficiency in Tax Court

13. During the hearing and briefing, in Tax court case No.1,defendant pleaded no matter constituting an avoidance or affirmative defense (T.C.Rule 39) and the Tax Court, on its own cognizance found no such prevention to the computation of the deficiency in conformancy with Sec.6211(a)

DEFINITION of a DEFICIENCY; Sec.6214(b) JURISDICTION OVER OTHER YEARS; as required by Subtitle A-INCOME TAX, and as promised by T.C.rule 155(b). Furthermor Respondent stated to the District Court, referring to the Tax Court case:

> "More importantly though, on the day of the determination the correction of the error was not prevented by the operation of any law or rule of law as required by Section 1311(a)." E.R.17.

14. At the Rule 155 hearing the Tax Court stated:

> "I think it's a prepaid interest case and the Court simply required that the interest not be bunched in one year, but that it be prorated over the loan period and having done that, I realy don't see where 481 applies to this case, and I think that what petitioner's realy attempting to do is what Rule 155(c) prohibits and that is, I think, they are attempting to raise a different issue or reargue the original issue under -- pretty much the same theory or somewhat the same theory under a different section of the code and that isn't permitted in the rule 155 computation. so since what they really have is a different theory, it's -- that's not appropriate under Rule 155 and even if it is, it's inconsistent with the way in which the court-reviewed opinion was decided---.

15. On April 28,1980 respondent mailed to plaintiffs a letter, and two audit reports one 10 page, one 7 page. The 7 page report is based upon Secs.1311-1314. (see E.R.27) Shortly after receiving the reports, I received a call from the Justice Department asking what I thought of these reports; this was a very obvious attempt to coerce petitioners into accepting settlement under Secs. 1311-1314. E.R.20.

16. The Tax Court stated (E.R.30 page 2):

> "The sole issue for decision is whether respondent erred in disallowing petitioners' deductions claimed for prepaid interest.".

Disallowing petitioners deductions was not an issue before the Tax Court in case No.1 The statutory notice made no such proposal and although defendant amended his pleading to include disallowance of the interest under Sec. 163, he abandoned this pleading in his brief. E.R.8.

17. In review of Tax Court case No.1 the

Court of Appeals for the Ninth Circuit stated:

> "Because our conclusion is based solely on the Commissioner's exercise of discretion under § 446(b),we need not decide whether the Coles had a binding obligation prior to the effective date of revenue Ruling 68-643. E.R.22.

18. After the Tax Courts "decision", and after paying the over-assessment and befor the Tax Court "decision" became final petitioners filed suit No.3 . The necessity for this suit was: 1. The Tax Court had failed to redetermine the deficiency or to cite a law or rule of law which would prevent it from correctly doing so, therefore Sec.1311 was not viable until such "determination was obtained; 2. Refund was available by way of Sections 481(b)(3)(B) and 6511(d)(2)(B) and because petitioners had timely filed for refund, refund was not barred by Sec. 6511(b) or by 6512(a) with respect to any act (or failure to act) to which the petition to the Tax Cou-

rt did not relate (see Sec.6512(a)), and then if the district court found that it was prevented by a law or rule of law from awarding refund, Sec.1311 would, then and only then,be applicable. See Sec 1311(a).

19. Case No.3 was reported in 81-2 USTC 87-789, as follows:

> "The taxpayer's claim for refund based upon income adjustments under Code Sec 481 and net operating loss carrybacks under Code Sec.172, was barred by Code Sec.6512 because the taxpayer had litigated his liability for the years in issue in Tax Court."

20. After the Tax Court filed their opinion Judge Wilbur stated: "There was no omission because the interest in issue was completely accounted for, and fully deductable.". SeeE.R.25

21. The Court of Appeals affirmed the decision of the Tax Court "solely on the Commissioner's exercise of discretion under Section 446(b)". SeeE.R.22

(g) (iii) REASONS FOR WRIT OF CERTORARI

A. The commissioner does not have legal authority,at all,to issue and prosecute to its conclusion a section 6212(a) notice of deficiency when he knows the sum demanded thereby is larger than authorized by law.

The secretary has only the power to collect the taxes imposed by the internal revenue laws. See Sec.6301.

When the Commissioner knowingly forced the collection of a greater sum than authorized by law he has committed an "OFFENSE" under the meaning of Sec.7214(a)

The fact that the courts have, in this case, upheld, by "legal fiction", the illegal actions of the Commissioner, does not lesson the guilt of the Commissioner, or the harm done to the taxpayer.

The Secretary is required to make the inquiries, determinations, and assessments of all taxes imposed by title 26 U.S.C. including all taxes determined by the tax-

payer, as to returns made under title 26 (See sec. 6201(a).

The term "deficiency" is clearly defined in Sec.6211(a). 26 U.S.C.. Once the method of computing taxable income is determined by a court, as it was in this case, and, where as here, there has been no question pertaining to the proper category in which the various items of income and deductions must be placed, SUBTITLE A-INCOME TAXES leaves no room for doubt as to the amount of the tax imposed by law.

Under a situation, such as existed in this case, wherein the only fault the Commissioner found with the timely submitted cash basis tax returns, was that the taxpayers long-standing cash method did not clearly reflect income, then the Commissioner is in violation of law, one of which (Sec.7214(a)) is an "offense", when he demands a greater sum than <u>authorized</u> by law. This section allows the court to ren-

der judgment against any officer or employee for damages sustained in favor of the party injured. Sec.7423 (2) makes the United States responsible for such damages.

Congress has not extended to the commissioner the power to assess and collect taxes other than that which is expressly authorized by the Internal Revenue Code. A greater sum than authorized by the Code is not authorized by law

The Commissioners derived his authority to change petitioners method of computing taxable income under Sec.446(b). That section requires that; "the computatation of taxable income shall be made under such method as, in the opinion of the Secretary does clearly reflect income. The Secretary has promulgated what in, his opinion, does not clearly reflect income in Reg. [2763] §1.446-1 (c) (2) (ii), that section states:

(ii) "No method of accounting will be regarded as clearly reflecting income unless all items of gross profit and deductions are treated with consistency from year to year".

(iii) "However,a taxpayer who uses the cash method of accounting in computing gross income from his trade or business shall use the cash method in computing expenses of such trade or business."

In this case the Commissioner computed petitioners'1968 taxable income using a hybrid method for that year, thus violating his own rule set fourth in (iii) above and then by refusing to allow a change to the same hybrid method for the years in which the disallowed interest would accrue until April 28,1980 he violated the rule set fourth in (ii) above.

FRAUD UPON THE COURT

Fraud upon the court was first delineated by the Supreme Court in Hazel-atlas Glass Co. V. Hartford-Empire Co. 322 us 238, 88 Led 1250, 64 S Ct 997, reh. den 322 US 772, 88LED 1596 , 64 S Ct. 1281. (1944). In Hazel-Atlas the patent office had issued a patent,largely based upon a fraudulent act perpetrated by defendant's attorney. Hence, in Judge Cohen's terminology, the fraud would be "intrinsic (IT was perpetrated by a member of the court system.)

In Kenner V. Commissioner (1968,CA7) 387 F2d 689, cert den US 481,21 Led 112, 89 S.Ct. 121 reh. den. 393 US 971, 21 L Ed 386, 89 S.Ct. 390, "fraud upon the court" was defined as embracing only that species of fraud which defiles, or attempts to defile, the court itself, or is a fraud perpetrated by officers of the court so that the judicial machin-

ery cannot perform in the usual manner its impartial task of adjudging cases ~~cases~~ that are presented for adjudication. In Kenner the court also said; it was necessary to show an "unconscionable plan or scheme" which was designed to improperly influence the court in its decision. Toscano V. Commissioner (1971, CA9) 441 F2d 930, 24 ALR Fed 683,wherein the fraudulent conduct was that of a tax payer filing joint returns and maintaining a Tax Court action with the petitioner as husband and wife although, the two were never married. Here the fraud, if petitioners' understanding of Judge Cohen's terminoligy is correct, would be branded "extrinsic".

1 / Rule 60. of Rules of Civil procedure dated October 1,1977, page 53 ---relief from final judgments may be granted for the following reasons---(whether heretofore denominated intrinsic or extrinsic, misrepresentation,or other misconduct of an adverse party. This rule does not limit the power of the court---to set aside a judgment for fraud upon the court.

From the above cases, and in view of Rule 60 R.of C.P.U.S. Dist.Cts. 1 / the supposition must be drawn that it is of little significance that fraud be categorized as "extrinsic" or intrinsic. In Lockwood V. Bowles the court said that even as regards perjured testimony,where the court or its officers were not involved,there was no fraud upon the court within the meaning of the rule. Thus lending substance to the ruling in Kenner to the effect that fraud perpetrated by officers of the court would constitute "fraud upon the Court".

From the beginning there has existed alongside the rule of finality of judgements a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud,relief will be granted against judgments regardless of the term of their entry,and that where enforcement of a judgment is man-

ifestly unconscionable,courts have wield-ad the power to grant such relief with-out hesitation. (See hazel-Atlas Glass .

it is therefor necessary to show only that there has been an unconcsion-able plan or scheme designed to improp-erly influence the court in its decision and/or that there has been unlawful acts (or failures to act) the result of which were detrimental to petitioners,and that the plan or acts were "after-discovered"

The perpetration of a plan to sub-vert the intent of the law has been pre-viously set fourth in this petition, it is a plan which is nurtured by the inab-ility of the court system to cope with the glut of cases within a reasonable time,which cases,to no small ext-ent are the product of the Service issu-ing, at the statutory level a notice of deficiency which demands a greater sum than authorized by law.

In case No.1 it was 7 years from the date of the statutory notice to the date the decision became final,and altho all of the involved years were open for refund on the day of the notice,defendant refused to account for the interest until April 28,1980; at which time they held there was a net operating loss of $25,133.03 in 1971,and one of $18,536.64 in 1970. But now, altho these years were open for refund,the statute of limitations had run on any adjustment for 1968, as a result of these carry backs,including adjustment under Sec.481(b) (3) (B), 6511 (d) (2) (B) and Sec.1311(a)
See E.R. 27 pages 3-5.

The "unconscionable plan or scheme" perpetrated by the I.R.S. and officers of the court is well documented it consists of:

First issuing a statutory notice of deficiency which the Service knew deman-

ded a larger sum than authorized by law

Second,submitting a computation for entry of decision,and a decision for the signature of the judge in the same amount as the notice of deficiency,when they knew the amount was greater than authorized by law. An obvious violation of Sec.7214(a).

Third,trying to pressure petitioners into accepting settlement under Secs. 1311-1314 while during the same period they were telling the court of judge Curtis "More importantly though, on the day of the determination the correction of the error was not prevented by the operation of any law or rule of law as required by Section 1311(a).

Fourth,refusing to allow accounting for the interest,which was disallowed as a deduction under the cash method of computing taxable income,until April 28, 1980, at which time, respondents infor-

med petitioners that they were prevented by law from any tax benefit from the net operating loss carry backs. SeeE.R.27.

Fifth, stating to the Tax Court at trial "if respondent prevails in this case, then by the terms of the statutory notice interest paid by the Coles will be prorated over the period of the loan" and then refusing to prorate the interest. See E.R.5-6.

Sixth, stating to the Court of appeals on appeal of case No.1 Cole will get his money in due time, while knowing the money was illegally taken in the first place, and while during the same period fighting like hell in district court to prevent Cole from getting his money back.

The Supreme Court,in Hazel-Atlas Glass Co.; altho not stressing the point mentioned "after-discovered fraud".Judge Cohen,while not explicit, appears to re-

fer to this concept,she dwells on the theme: "because the relevant facts were known to petitioners---";"none of the facts relevant to these decisions were concealed from or unknown to petitioners prior to the decision of this court---" etc.

While petitioners contest the supposition that fraud does not exist where the victim has knowledge that he is being cheated, on two grounds; first he,as a citizen, has the constitutional right to anticipate that as pertains to him, the law as passed by Congress will be interpreted and applied in its plain and usual manner without preference or prejudice,and secondly he may not,as in this case,be able to counter the gung ho attitude of the sovereign power which is perpetrating the fraudulent act. The issue is more or less moot in this case;it was defendants not plaintiffs who knew fraud was progressing as planned.

Petitioners did not know they would be denied proper redetermination of the alledged deficiency by the Tax Court,until that court refused to do so. Nor did they know their money would be illegally taken from them until it was in September 1977. Or that they could not get the money back, until they were denied refund under Secs.1311-1314,and equality with Russell, wherein the Court of Appeals for the Ninth Circuit remanded to the Tax Court for redetermination of Russells 1965 taxable income,a job the Tax Court had avoided nine years earlier.

DUE PROCESS and EQUAL PROTECTION OF THE LAWS

Petitioners hold that the Bill of Rights protects them from the effect of the tyrannical power of any and all branches of their government. That this protection extends to them; equal protection of the laws; the right to due process of the laws,and the right to be secure in their papers against unreasonable search from which seizure resulted.

In this case such seizure resulted from the Service and the courts conducting a diligent search for the purpose of proving "distortion of income". But refusing to search to determine if their computation clearly reflected income, as required by Sec.446(b).

1. In 1945, in acquiescence to John D. Fackler V. Commissioner, 39 B.T.A. 395, and Court Holding Co. V. Commissioner, 2 T.C.531 (1943), the Service promulgated

I.T.3740, in which they held that, where a taxpayer filed federal income taxes on the receipts and disbursement method of accounting,interest paid in advance for a period not in excess of 5 years is deductible for the year in which paid. On November 26,1968, without prior warning, and where there had been no change in the law,the Service Reversed their stand holding, that such deduction,"may not result in a clear reflection of income for the taxable year of payment".

In this period between the issuance of I.T.3740, in 1945 ,and November 26, 1968, a period of 24 years, petitioners were the first to be denied the results of cash method of accounting solely on the basis that such results did not clearly reflect income.

Petitioners hold that they had the constitutional right to challenge the Commissioner's authority regarding the

method change,and when they lost on that issue, then, after that event, to be assessed no more than that which was the result of that event computed on the basis of the information contained in the cash basis tax returns which had been previously submitted to both the Tax Court and respondents, and that this right existed regardless of petitioners ability to respond.

2. Petitioners were the first taxpayers ever to be forced from a consistent cash method to a combination which is neither the cash or the accrual method, but a combination of both systems.See Security Flour Mills V. Comm. 321 U.S. 281.

3. Petitioners were denied "redetermination"of the alleged deficiency by computation of taxable income as required by Sec. 446(b); the very section by which defendant and the courts claimed authority to deny to taxpayers their cash

method of computing taxable income.

4. Petitioners were denied the protection of Sec.481 concomitant with a change in method of computing taxable income, whereas the Commissioner has insisted that Sec.481 must be used in like circumstances in order to clearly reflect income in:

Graph Chevrolet co. V. Campbell 343 F2d 568 (1965).

Peoples Bank and Trust Co. V. C.I.R 415 F2d 1349 (1969).

Adolph Coors V. C.I.R. 519 F.2d 1280 !975.

Western Cas. and Sur. Co. V. C.I.R. 571 F.2d 514 (1978).

5. Petitioners were denied the Benefit of Sec. 1311- 1314 while in similar circumstances other taxpayers were not so denied:

Benenson V. United States, 257 F. Sup. 101 (1966).

Oklahoma Gas and Electric Co. V. U.S. 464 F.2d 1188 (1972).

J.N.B.Tel.Co.Inc. V. United States 638 F.2d 227 (1981)

Chertkof V. U.S. 49 AFTR 2d 1094.

6. At the Rule 155 hearing Judge Wilbur ruled that,petitioners use of Sec.481 in their computation for entry of decision was; 1. a different section of the code and that isn't permitted in the rule 155 computation, and 2."--- I think,they are attempting to raise a different issue or reargue the original issue under--pretty much the same theory---.". The decision of the Tax Court must have warrant in the record; see Dobson V. Commissioner 320 U.S. 489-507, 88 L.ed 248;the record must be reported in writing,Sec.7459(a) and 7459(b); the Tax Court did make such report in case No.1.and there was no mention,or reference to any section of the Code to which Sec.481 is not compatible.

Whether the applicable statutes and regulations properly interpreted forbid a certain method of calculation followed by the Tax Court in computing federal income tax, is a clear cut question of law to be decided by the courts; see Dobson V. Commissioner. Not only did the Commissioner violate petitioners constitutional rights when he knowingly assessed,prosecuted,and collected a greater sum than authorized by law; but so did the Tax Court when,without designating a section of the Code to which Sec.481 was different denied petitioners the protection of Sec.481 on the grounds that it was a different section,and a different issue.

7. The Court of Appeals denied petitioners review of the afore stated violations of law when it reached its conclusion "solely on the Commissioner's exercise of discretion under sec.446(b).

Thus denying petitioners due process of law.

8. After their decision the Tax Court stated "There was no omission because the interest in issue was completely accounted for,and fully deductible.". See E.R.25.

The above statement was made with knowledge that the decision,which Judge Wilbur had signed only 32 days earlier, did not take into account the effect of accounting for the interest in subsequent years, had upon the year before the court; (See Sec.6214(b)). This statement was a deliberate falsificaion of fact.it had one purpose,and that was; to cover up defendants failure,and the courts refusal to account for the interest when accrued and the court's refusal to abide by the law of Sec.163,Sec.172,Sec.6214 (b) and Sec.481(a) (2). By this ruse petitioners' right to due process of law

and equal protection of the laws were abridged.

9. The Court of Appeals violated petitioners right to due process of law when, without addressing any issue other than the degree of "distortion" caused by petitioners cash method of accounting,they based their "conclusion" solely on the Commissioner's exercise of descretion.

Petitioners assert that the Commissioner violated the law (Sec.7214(a)) when he issued, and prosecuted to its conclusion, a statutory notice of deficiency which he knew at the time of such issuance,and prosecution,demanded a greater sum than authorized by law,and that the courts aided and abetted this violation of the law when they refused to redetermine the alleged deficiency in accordance with the law,and that such violations deprived petitioners of due process of law,equal protection of the

laws,and subjected them to unreasonable search from which seizure resulted.

PETITIONERS' ACTIONS FOR REFUND IN DISTRICT COURT

District Court cases Nos. 3.and 5 were requests for refund of taxes illegally assessed and collected. These suits were filed under authority of Sec.7422(a) Refund was denied on the grounds That: 1. Once a taxpayer files suit under Sec. 6213(a), Sec.6512(a) prevents any further claims for the same taxable year with respect to matter which was brought or could have been brought up before the court, and; 2.the first case is res judicata to further actions. These restrictions were held to take precedence over those sections which circumvent any law or rule of law such as Sec.481(b) (3) (B); 6511(d) (2) (B);and 1311-1314.

Courts in the First,and Second cir-

cuit have reached results similar that stated above, but not always; the Ninth Circuit Court of Appeals Reversed their stand in Russell but did not in Cole.

Courts of the Fourth, Seventh,and Tenth Circuits have held opposite to that of the courts cited above, see Van Dyke V.Kuhl 171 F.2d 187 [37AFTR 613],(7th cir. 1948); Magruder V. Safe Deposit & Trust Co.,159 F.2d 913 [36 AFTR 32] (4th Cir.1947); Martin V. Brodrick, 177 F2d 886 [38AFTR 1003 (10th Cir. 1949).

The Code contains exceptions to the finality of decisions. That of Sec.7422 (e) "---shall lose jurisdiction of taxpayers suit to whatever extent jurisdiction is aquired by the tax court of the subject matter of taxpayers suit for refund."that of Sec.6512(a) "--- no credit or refund of income tax for the same taxable year --- with respect to any act or (or failure to act) to which such petit-

relates,---shall be allowed or made---." and that of Sec 6512(b) "--- if the Tax court finds that the taxpayer has made an overpayment of income tax for the same taxable year, with respect to any act (or failure to act) to which such petition relates---the Tax Court shall have jurisdiction to determine the amount of such overpayment.

The Code contains other exceptions to the finality of Tax court decisions, which exceptions are viable only if deference is paid to those cited above,i.e. that of Sec.481(b) (3) (B),"---the increase or decrease in the tax for any taxable year for which --- a credit or refund of an overpayment,is prevented by any law or rule of law,shall be determined by reference to the tax previously determined (within the meaning section 1314(a) for such year."; that of Sec. 1311(a) which circumvents "any law or

rule of law" which would otherwise prevent refund,and that of Sec.6511(d) (2) (B) which allows refund which is due to a loss carry back which was not an issue before the Tax Court.

Astuteness of the first order is not necessary to percieve that Congress intended that the taxpayer would have access to a district court for refund of taxes overpaid,which overpayment is with respect to any act (or failure to act) to which such petition does not relate.

The decision in regard to; case No.1 was reached on the grounds of an extremely vague rule of law; that of case No.3 on the grounds of the bar of Sec.6512(a) that of case No.5 on the grounds of the the bar of res judicata;and that of case no 7 on the grounds that petitioner had not filed for refund within the 90 days allowed by Sec.6213(a). In no case was the verdict reached on its merits.

In view of the above cited exceptions to the finality of decisions and the remedies to wrongful decisions, listed above,it is evident that Congress did not intend that hide-bound interpretation of law,or rule of law would prevent correct and proper redetermination of taxable income.

Petitioners' stake in this action is equal to the amount of their loss incurred because of the aforementioned wrongful and unlawful acts or failures to act which amount is:

Taxes,int. etc.paid	$46,240.
int. to 12/31/'87	52,251.
costs incurred	74,000.
loss from forced sale of apartments	1,798,000.
	$1,965,867.

Wherefore petitioners trust this court will:

1. Find in favor of petitioners in the amount of 1,965,876.,or

2. Reverse the lower court's dismissal of petitioners request for calendaring their refund claim and remand for proceedings consistent with its findings.

Dated this 3 of Febuary 1988

respectfully submitted.

James V. Cole

James V. Cole
7300 Madrona Dr. N.E.
Bainbridge Is. Wn. 98110
(206) 842-2337

CERTIFICATE OF SERVICE

It is hereby certified that service of the forgoing petition has, this 3 day of March 1988, been made on defendant by mailing, by certified mail, to:

The Solicitor General
of the United States
c/o Roger M.Olsen
Assistant Attorney General
Tax Division
Post office Box 502
Washington,D.C. 20044

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APPENDIX INDEX

PAGE

MEMORANDUM Court of Appeals No.86-7531.....1

ORDER Amendment of above memorandum..... .6

ORDER DenYing rehearing.....7

ORDER AND ORDER OF DISMISSAL Docket No.28980-85.....8

MEMORANDUM SUR ORDER Tax Court Docket No.28980-85...9

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-7531

T.C. No. 28980-85

MEMORANDUM*

JAMES V. COLE: ESTHER R. COLE,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE
Respondent-Appellee.

Appeal from the United States Tax Court
Submitted** August 5, 1987
San Francisco, California
Filed Sep 28 1987

BEFORE: BARNES, MERRILL and NELSON,
Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

/

This is the Coles' fourth appeal to this court relating to their tax liability for the 1986 tax year.

1. The district court originally upheld the Commissioner's deficiency determination as of that year which disallowed taxpayers' deduction for 40 months' prepaid interest and required them to allocate that interest to the tax years to which each related. That decision was affirmed by this court on appeal and certiorari was denied by the Supreme Court, 441 U. S. 924 (1979). The deficiency was then paid by taxpayers.

2. In 1973 taxpayers filed a refund action in the district court seeking a refund of taxes for the 1968 tax year based on the proposition that net operating losses suffered in 1970 and 1971 should be carried back to offset 1968 liability. The district court held that while taxpayers should be allowed to deduct operating losses suffered

in 1969, 1970 and 1971 resulting in a refund of taxes to them for those years, it rejected any carry back of those losses to 1968. This court affirmed.

3. Taxpayers then filed a second refund suit which was rejected by the district court on the ground of res judicata in a judgment affirmed by this court.

4. In the instant case, taxpayers petitioned the tax court to reopen the proceeding respecting 1968 to enable them to assert a refund claim respecting operating losses suffered in 1970 and 1971.

The tax court held that it was without jurisdiction to entertain the petition because it was not filed within 90 days from the sending of the notice of deficiency as required by section 6213(a). Failure to file within the required period requires that the petition be denied for lack of jurisdiction,

Healy v. Commissioner, 351 F. 2d 6021 (9th Cir. 1965). In this case the notice of deficiency respecting taxpayers' 1968 tax year was sent to petitioners on April 7, 1972 and the petition now before us was filed on July 22, 1985, more than 13 years later. Taxpayers now seek to set aside the earlier decision through the filing of a supplemental pleading alleging fraud on the court. The tax court stated that it would treat the petition as a motion to set aside its decision in the taxpayers' initial proceeding on the basis of extrinsic fraud. The court subsequently denied such motion holding that the taxpayers had failed to establish fraud. It denied the proceeding for lack of subject matter jurisdiction. Taxpayers then took this appeal.

We affirm. The tax court properly refused to reopen the case. The only "fraud" asserted by taxpayers was their allegation that the tax court had erred in its resolution

of their claim. This does not constitute fraud. The present claim is clearly time barred.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-7531

T.C. No. 28980-85

O R D E R

JAMES V. COLE: ESTHER R. COLE,
Petitioners-Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE
Respondent-Appellee.

Before: BARNES, MERRILL, and NELSON,
Circuit Judges.

The memorandum disposition of September 28, 1987, is amended as follows:

"1986 on page one, paragraph one is changed to "1968."

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-7531

T.C. No. 28980-85

O R D E R

JAMES V. COLE; ESTHER R. COLE,
Petitioners-Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE
Respondent-Appellee.

Before: BARNES, MERRILL, and NELSON,
Circuit Judges.

The petition for rehearing is DENIED.

7

UNITED STATES TAX COURT
WASHINGTON, D. C. 20217

Docket No. 28980-85

JAMES V. and ESTHER R. COLE
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER AND ORDER OF DISMISSAL
FOR LACK OF JURISDICTION

Respondent's Motion to Dismiss for Lack of Jurisdiction filed December 17, 1985, and petitioners' Motion for Supplemental Pleading to Include Fraud Upon the Court filed January 28, 1986 (i.e., their motion to vacate decision on grounds of extrinsic fraud) came on for hearing in Seattle, Washington, on May 5, 1986. Upon due consideration, and for reasons more fully set forth in the Memorandum Sur Order attached hereto, it is hereby

ORDERED: That petitioners' Motion for Supplemental Pleading to Include Fraud Upon the Court is denied, and that respondent's above-referenced motion to dismiss is granted and this case is dismissed for lack of jurisdiction.

Mary Ann Cohen
Judge

Entered: Jun--1985

8

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

Docket No. 28980-85

JAMES V. and ESTHER R. COLE
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MEMORANDUM SUR ORDER

The petition herein was filed on July 22, 1985, and purported to "petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated April 7, 1972, and the decision of the Tax Court, re the alleged deficiency, dated November 4, 1976." The year involved in the said notice of deficiency and decision of the Court was 1968. The petition alleges errors

in (1) failing to consider a net operating loss carryback to 1968 and (2) not taking "into account amounts which were made necessary, solely by reason of the method of accounting change, in order to prevent amounts from being omitted." The said decision of the Court was entered in docket Nos. 5403-72 and 803-73, on the basis of our opinion at 64 T.C. 1091 (1975), affd. 586 F.2d 747 (9th Cir. 1978), cert. denied 441 U.S. 924 (1979). The Court decided that certain prepaid interest was not deductible in full in 1968 and had to be prorated to subsequent tax years not before us.

On December 17, 1985, respondent filed herein a Motion to Dismiss for Lack of Jurisdiction. On January 28, 1986, petitioner filed a Motion for Supplemental Pleading to Include Fraud upon the Court. Both of the foregoing motions were calendared for hearing and were heard in Seattle, Washington,

on May 5, 1986. The parties were advised that the Court is treating petitioner's filings, taken together, as a motion to vacate our 1976 decision in docket Nos. 5403-72 and 802-73 on the ground of extrinsic fraud.

In Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971), the Court of Appeals discussed the difficulties in defining the type of fraud that would justify this Court's reopening an otherwise final decision. It is apparent from that opinion, however, that a claim of fraud justifying such extraordinary relief must be based on facts that were not know to the party seeking relief prior to entry of the original decision. Under certain circumstances, suppression of facts or other conduct that prevents a party ignorant of those facts from having his or her day in Court may constitute such fraud as to permit relief from an otherwise final judgment. Such is not the case here, however.

//

At the time of entry of the decision with respect to their 1968 tax year, on November 4, 1976, petitioners were not prevented from having knowledge of any facts relevant to the determination of their liability for that year and in fact were aware of the matters that they now raise. Prior to entry of the Court's prior decision, petitioners specifically asserted the application of section 481,[1] arguing that their method of accounting was changed with respect to the item in dispute in the case. A hearing was held on October 20, 1976, and the Court rejected petitioners' contention. Decision was entered on November 4, 1976. Thereafter petitioners requested an explanation of the Court's decision,

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[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended and in effect during the year in issue. and, by Memorandum Sur Order dated December 6, 1976, the Court specifically held that section 481 was inapplicable to the present controversy.

and, by Memorandum Sur Order dated December 6, 1976, the Court specifically held that section 481 was inapplicable to the present controversy.

The Court's decision of November 4, 1976, was appealed and was affirmed by the Court of Appeals for the Ninth Circuit in an opinion filed November 22, 1978. Petitioners sought certiorari from the United States Supreme Court, but their petition was denied by the Supreme Court on April 23, 1979. Although the opinion of the Court of Appeals does not address the issue raised by petitioners with respect to section 481, petitioners have presented in evidence at the hearing on their pending motion copies of the record on appeal showing that the issue of the application of section 481 was raised in the notice of appeal, in their brief, and in oral argument before the Court of Appeals. In any event,

whether the issue was or could have been considered in the prior case, the issue of the applicability of section 481 to petitioners' tax year 1968 has finally been concluded adversely to petitioners. Because the relevant facts were known to petitioners and to the Court, the doctrine of extrinsic fraud does not apply.

With respect to the claimed net operating loss carryback, petitioners are apparently referring to amounts allegedly arising during their taxable years 1970 and 1971. At the time of entry of our decision in the prior case, all facts relating to tax liability for those years had occurred. Petitioners had claims for refund pending with respect to those years. In any event, they were litigated by petitioners in the United States District Court for the Western District of Washington and were decided adversely to petitioners in a decision filed May 8, 1981,

reported at 52 AFTR2d 83-d5458 and 81-2 USTC para. 9538. The District Court held that the 1970 loss was applied in its entirety to petitioners' liability for 1967, "leaving no loss carryback to apply against the 1968 or 1969 years." With respect to the 1971 loss carryback, the District Court held that "plaintiffs failed to raise this issue before * * * [the Tax Court]. Consequently, section 6512(a)(2) does not apply, and this claim is barred." The decision of the District Court was appealed and was affirmed by the Court of Appeals for the Ninth Circuit on March 7, 1983, in an unpublished opinion. Rehearing was denied April 29, 1983.

In the first District Court case, petitioners also raised the effect of mitigation provisions under sections 1311 through 1314. The District Court, in its opinion of May 8, 1981, supra, held that the taxpayers

did not qualify for relief under those sections. On July 11, 1983, petitioners commenced another action in the District Court for the Western District of Washington, docket No. C83-960V. On March 2, 1984, the District Court in this second action granted the Government's motion to dismiss the complaint on the ground of res judicata. On motion for reconsideration, the court issued an order dated April 10, 1984, awarding attorney's fees to the United States and against the taxpayers. Cole v. United States, 54 AFTR2d 84-5293, 84-1 USTC para. 9492. This second District Court decision was affirmed on May 13, 1985, by the Court of Appeals for the Ninth Circuit without published opinion, 762 F.2d 1017 (9th Cir. 1985). Shortly thereafter, petitioners commenced the instant proceeding.

From the above chronology, several things are apparent. First, the issues now

raised by petitioners were previously raised and decided against them by various courts in orders now final. Second, none of the facts relevant to those decisions were concealed from or unknown to petitioners prior to the decision of this Court in their prior case. Third, petitioners are merely pursuing legal theories that are inapplicable to their case or claims that are barred by expiration of the period of limitations (their net operating loss carrybacks). In summary, petitioners have been told repeatedly that they are wrong. That conclusion is based on legal reasoning that they refuse to accept and not on fraud.

Petitioners' motion to vacate decision on grounds of extrinsic fraud therefore must be denied. Respondent's Motion to Dismiss for Lack of Jurisdiction must be granted.